

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 1997 Supp. 44-534a is limited to issues involving the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. See K.S.A. 1997 Supp. 44-551(b)(2)(A). "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review

by the board.” K.S.A. 1997 Supp. 44-534a(a)(2). Accordingly, for the Appeals Board to determine whether it has jurisdiction to review an appeal from a preliminary hearing order it is incumbent upon the Administrative Law Judge to state the basis for his or her denial of preliminary benefits. Here the Special Administrative Law Judge did not do so in his Order, but the parties agree and the transcript confirms that the Special Administrative Law Judge based his denial of benefits upon a finding that claimant failed to prove he gave notice of accident to the employer within 10 days, and claimant failed to establish just cause for his failure to give said notice as required by K.S.A. 44-520. The Administrative Law Judge also decided the issues of injury by accident and whether the claimant’s injury arose out of and in the course of his employment with respondent on the date alleged. Those issues were not appealed and, therefore, will not be addressed by the Board. The issue raised by claimant as to notice is subject to review on an appeal from a preliminary hearing order.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer’s duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer’s duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Special Administrative Law Judge found claimant was injured on July 12, 1997. There is considerable doubt concerning the accident and the date of accident. However, for the purpose of determining whether claimant gave timely notice of accident, the Appeals Board will adopt the date of accident alleged by claimant and as found by the Special Administrative Law Judge. The parties agree that notice was given within 75 days. The issue is whether claimant gave notice within 10 days and, if not, whether just cause was established for the claimant’s failure to give notice within 10 days. This issue turns primarily upon the question of the claimant’s credibility. Claimant alleges that he immediately informed his supervisor, Juan Diaz, of his injury but that he subsequently failed to describe his injury to the company nurse and to the Assistant Personnel Director

as work related because he was not sure what caused his injury until after seeking medical treatment. Accordingly, if claimant's testimony that he gave notice on the accident date is not believed, then the fact finder is asked to believe that claimant did not realize his injury was work related and then must decide whether that constitutes just cause.

Claimant has been employed with respondent since January 15, 1996. His job as a "picker" requires him to throw boxes of meat weighing between 72 and 100 pounds for 8 to 10 hours a day. Claimant testified he experienced a severe onset of pain in his low back and down his left leg while throwing boxes on Saturday, July 12, 1997. He said it felt like he pulled a muscle. Claimant alleges he told this to his supervisor but was advised that there was no nurse on duty so all the supervisor could do was give him Advil. He completed his work shift, but the next day the pain was so bad he "couldn't do anything." The next day was a Sunday and he was not scheduled to work. Claimant called in Monday and Tuesday, but on Wednesday, he decided to go back in and try to work. But before starting work on Wednesday, he first went to see the company nurse. She determined he could not work and took him to see the Assistant Personnel Director, Darren Tharp. Claimant was placed on a leave of absence. He saw his chiropractor the next day. Although claimant testified that he told Mr. Tharp what had happened, claimant also alleges that it was not until after he had a diagnosis that claimant determined he had suffered an injury by accident within the meaning of the Workers Compensation Act. Claimant states that when he initially reported the condition to the Assistant Personnel Director he was not sure whether the injury was from work or whether it was the result of an altercation at home that occurred the year before.

The company nurse's notes reflect that when claimant reported to the nurse's station on Wednesday July 16, 1997, claimant told them that his injury was not work related. He referred to an incident where he had been involved in an altercation about a year before. Claimant agrees that he mentioned that incident because the pain he was experiencing was similar, but he denies saying that incident was the reason for the pain.

Mr. Tharp also testified at the preliminary hearing. He approved claimant's medical leave of absence. During this time from July 17, 1997, through September 12, 1997, claimant never informed him that his injury was anything other than personal. The first notice he received of a work-related injury was a September 24, 1997, letter from claimant's attorney.

Michelle Plotner, the nursing clerk in respondent's nursing department, testified that she spoke with claimant on July 16, 1997, at the nurse's station. Claimant stated to her that his back pain was not at all a work-related problem. He stated that he has had pain for a year since he was jumped by a group of guys and beaten up.

Claimant also alleges that he told the chiropractor that his injury was work related, but his records do not contain such a history.

On September 11, 1997, claimant filled out an application for disability benefits wherein he again described the injury as having occurred at home when he was jumped by four guys.

The claimant even contradicted himself during his preliminary hearing testimony. On cross-examination, after claimant repeated his direct testimony that he told everyone, including his supervisor, the company nurse, the Assistant Personnel Director, and the chiropractor, that his pain was due to work, claimant changed his story and said that at first he thought his pain was due to the altercation a year ago and told everybody it was personal and not work related. But later, after he went to the chiropractor and was diagnosed, claimant checked his medical records from the altercation and determined those injuries were to a different part of his body. Claimant then said it wasn't until two to four weeks after this accident at work before he realized his injury was work related and first informed respondent of that claim. He was then told that he could not change the records.

The Appeals Board finds claimant has not met his burden of proving just cause for his failure to give his employer notice of a work-related accident or injury within 10 days.

Claimant did give respondent notice within 75 days, which is the longest time period permitted by statute for the giving of notice where just cause has been established. The Special Administrative Law Judge found that just cause was not shown for claimant's failure to give his employer notice of accident within 10 days. Claimant alleges there was just cause based upon claimant's failure to attribute his injury to the specific "accident" or traumatic event at work until sometime after he learned the diagnosis. However, claimant also alleges he reported his injury to his supervisor right away. Furthermore, he testified that he knew that if it was, in fact, a work-related injury, that notice was required. Nevertheless, claimant waited until beyond the 10 days to impart this information to his employer. Thus, claimant had knowledge of a work-related injury within 10 days of its occurrence but did not communicate this information to his employer within 10 days as required by statute. Claimant was informed of this reporting requirement by the respondent during his orientation. Also, claimant had been written up before for not timely reporting an injury. Claimant acknowledged that he knew he was to report accidents immediately.

The Appeals Board finds just cause has not been established. Accordingly, based upon the record as it currently exists, claimant has failed in his burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order of the Special Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation entered by Special Administrative Law Judge William F. Morrissey dated April 16, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Jack W. Shultz, Dodge City, KS
D. Shane Bangerter, Dodge City, KS
William F. Morrissey, Special Administrative Law Judge
Pamela Fuller, Administrative Law Judge
Philip S. Harness, Director